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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 859

ISTHMIAN LINES, INC.
AND
JARKA CORPORATION OF BALTIMORE, *Petitioners,*

v.

WILLIAM BALLWANZ, TO THE USE OF LIBERTY MUTUAL INSURANCE COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION

JOHN J. O'CONNOR, JR.,
Attorney for Respondent.

The Daily Record Co., Baltimore 3, Md.

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Questions Presented

Respondent finds himself constrained to reject the "Questions" proposed by the Petitioners, and submits in lieu thereof the following "Questions Presented", which were raised in his appeal and expressly decided by the Court of Appeals:

1. Did the trial court commit reversible error in its charge to the jury by:

   a. Diluting the duty imposed by the warranty of seaworthiness through **deemphasis** of its **affirmative nature** and **overemphasis** of its **negative** aspect? (Emphasis throughout added, unless otherwise indicated.)

b. Instructing "**there must be fault on the part of the shipowner**" in order for the Plaintiff to recover against the ship?

c. Instructing the jury it might consider the fact that "**no complaint** was made by the Plaintiff . . ." about the spreader?

d. Instructing the jury it might consider that the Plaintiff and his fellow longshoremen "did not ask for wire or cord to tie or lash the spreader to the wire sling or cable"?

e. Instructing the jury it might consider the fact the men at the forward end of the crate, instead of using the method followed by the Plaintiff, passed the spreader by "handing it up onto the top deck" seven feet above?

2. Did the trial court commit reversible error in directing the entry of a judgment in favor of the Defendant on the basis of Answers to Issues which were conflicting and irreconcilably inconsistent?

Statement of the Case

Respondent accepts as substantially correct the Statement of the Case contained in the Petition for a Writ heretofore filed in these proceedings, but wishes to offer the following corrections and additions.

There was conflict in the testimony with respect to the use of unsecured spreaders on the Baltimore waterfront. Longshoreman and his co-workers all testified this was the first and only time they had ever used an unsecured spreader — all the others were secured to the wire or cable and could not come off. Although shackled to the wire,

some could be moved up or down on the wire; others remained fixed in one position.

The spreader was to serve two functions. First, as the load was coming in, it was to spread the wires apart and thus keep them from pressing against and crushing the crate. Second, **it had to be hoisted safely back out of the hold.** It performed its first function admirably. It **failed** its second **test wretchedly.** The spreader wouldn't stay in its loose cradle of wire, slipped from its precarious perch and plummeted back into the hold.

The crux of the case was whether the unsecured spreader, as part of a rig for going into and coming out of the hold, was a seaworthy appliance — not whether the spreader, as a piece of lumber, was free of defects. Was the unloading gear — specifically, the loose, unsecured wooden spreader and the springy, stiff wire — fit for the purpose for which it was used?

The method of removing the unsecured spreader from the hold was followed on instructions yelled down from up on deck. The source of these instructions was not established — that is, whether an employee of the stevedoring contractor or member of the crew issued them. The stevedoring foreman testified he saw the night mate on the vessel that evening.

Reasons for Denying the Writ

Incipiently, Respondent wishes to assert Petitioners seek to build a straw man and then proceed to tear their own creation apart by citing an imposing list of twenty four cases. The Court of Appeals, after measuring the lower court's charge in accordance with standards set by this Court, detected six substantial errors, reversed and remanded for a new trial. The errors of the trial court and

the rationale of the Court of Appeals in rectifying them are set forth seriatim.

1 a. *The trial court* **diluted** *the duty imposed by the* **warranty of seaworthiness through deemphasis** *of its* **affirmative** *nature and* **overemphasis** *of its* **negative** *aspects.*

In its charge, the District Court devoted 15 lines to what might be termed its concept of the affirmative aspect of the warranty of seaworthiness, and 40 lines to what might be termed its concept of the negative aspect of the duty. In defining the affirmative aspect of the duty, the Court used the word **"absolute"** but **once**; in defining what it considered the negative aspect of the duty, the Court used the terms **"reasonably", "reasonable"** and **"unreasonable"** a total of **10 times.**

The charge throughout was characterized by an ideological attempt to define an "absolute" standard in terms of "relative" duties, to "qualify" an "unqualified" duty by equating it with negligence concepts and the relative standard of "reasonableness" or the conduct of the "reasonable" man. The charge was philosophically and logically contradictory and engaged in linguistic sophistries, by attempting to assert that the "absoluteness" of the warranty of seaworthiness was a type of "absoluteness" which isn't really "absolute" at all, but merely "relative".

Under the bountiful aegis of the Supreme Court, the seaworthiness doctrine has developed until, today, it is one of the most stringent liabilities imposed by our courts. The mantle of protection has been constantly extended to accomplish its beneficient purpose. The charge of the instant case, in the unbalanced form presented, repudiated principles of humanitarian maritime law enforced by this Court for over six decades.

In commenting on this, the unanimous Court of Appeals stated (App. 6a):

> "We are also of the opinion that the Court erred in its charge to the jury in three respects; . . . second, the Court in its repetitive insistence that the equipment need be only *reasonably* fit for the purpose for which it was being used grossly deemphasized the affirmative aspects of the doctrine of seaworthiness as laid down by the Supreme Court . . ." (Emphasis the Court's.)

Further critically analyzing the defective charge, the Court continued (App. 8a):

> "This emphasis of the 'negative' aspects of the duty by its use of the terms 'reasonably', 'reasonable', and 'unreasonable', constantly repeated in defining the nature and extent of the duty, *diluted and adulterated* the character of the *warranty* of seaworthiness. Interspersed and repeated as they were throughout that portion of the charge devoted to defining and explaining the doctrine of liability for unseaworthiness, these words and phrases were tantamount to suggesting a requirement that the jury must find negligence in order to hold the shipowner liable, an obviously incorrect standard which might well have confused and misled the jury."

1 b. *The lower court erroneously instructed* "**there must be fault on the part of the shipowner**" *in order for the Plaintiff to recover against the ship.*

In the 1946 landmark case of *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872, this court considered a claim arising out of injuries traceable to the latent defectiveness of a shackle. After explaining the nature of the warranty of seaworthiness, the court asserted:

> "It is essentially a species of **liability without fault** analogous to other well known instances in our law" (p. 95).

Whenever one finds the term "seaworthiness" in the opinions, it is almost invariably accompanied by its Siamese twin, "warranty". To recover under a warranty, it is not necessary to prove "fault" on the part of the person or corporation issuing the warranty. All that is required is a causal relationship between the injury and the breach of warranty. It is respectfully submitted that the use of the word "fault" injects a negligence concept into the mind of the average juror, most of whose experience is with automobile law in the personal injury field. In Black's Law Dictionary, fault is defined, "Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty or rectitude; any shortcoming or neglect of care in performance resulting from inattention, incapacity or perversity. . . ."

Concerning this fatal flaw in the charge, the Court of Appeals stated (App. 6a):

> "We are also of the opinion that the Court erred in its charge to the jury in three respects: first, in defining unseaworthiness, its emphasis upon the necessity of finding fault on the part of the vessel could easily have led the jury to confuse the concept of fault with the common law concept of negligence. . . ."

Continuing, the Court explains its rationale (App. 6a):

> "In its charge to the jury the Court emphasized the fact that unseaworthiness cannot occur without fault of the shipowner. However true it may be as an abstract proposition of law that unseaworthiness in a broad general sense cannot exist without fault on somebody's part in that it constitutes a breach of one's duty, it is not a fault in the ordinary everyday use of the term."

Finally, it observed (App. 7a):

> ". . . Thus the obligation of seaworthiness is absolute in character and is not satisfied by the exercise of rea-

sonable care on the part of the shipowner, nor is it affected by relinquishment of control to another, such as a stevedore employer of a longshoreman . . . Thus the Court's emphasis upon the necessity of finding fault, when considered with reference to the balance of the charge, was an unjustifiable dilution of the doctrine of seaworthiness as it has been developed by the Supreme Court."

1 c. *The trial court erroneously instructed the jury might consider the fact* **"no complaint** *was made* **by** *the* **plaintiff"** *about the spreader.*

Also woven through the fabric of the charge was a dogged devotion to the discarded "assumption of the risk" philosophy. Although the precise term was scrupulously avoided, the defective thread can be detected in this excerpt from the charge:

> "In connection with the issue of seaworthiness, you may also consider the fact that **no complaint was made** by the Plaintiff or any of the other members of the gang to the gang carrier or by the gang carrier to the foreman about the spreader . . ."

The compelling inference is, we suppose, that the longshoreman accepted the condition — i.e., assumed the risk of the condition. By this comment, the repudiated doctrine was insinuated into the case. Attaching any significance to the fact no complaint was made by the longshoreman was expressly ruled to be fatal error in *Grzybowski v. Arrow Barge Company, Inc.*, 1960, 283 F. 2d 481, citing *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 4 L. Ed. 2d 941, 80 S. Ct. 926, and *Puerto Seguro Cia. Naviera, S. A. v. Pitsillos*, 1960, 279 F. 2d 599. See also *The Arizona v. Anelich*, 1936, 298 U.S. 110, 80 L. Ed. 1075, 56 S. Ct. 707; *Beedle v. Spencer*, 1936, 298 U.S. 124, 80 L. Ed. 1082, 56 S. Ct. 712; *Socony Vacuum Oil Co. v. Smith*, 1939, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262.

The Court of Appeals had this to say about this error in the trial court's charge (App. 6a):

> "Finally, in the factual aspects of this case, it was error to charge the jury, that in considering the seaworthiness of the gear they might take into consideration the plaintiff's failure to complain or to demand additional materials to make it better suited to the purpose for which it was being used."

It set forth the basis for its holding in these words (App. 9a):

> "The plaintiff . . . had no responsibility for, or authority over, any of his fellow workers. His duty was to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow or to devise a safer method, nor was he obligated to call for additional or different equipment. If the doctrine of seaworthiness means anything, it is totally repugnant to the doctrine of assumption of risk on the part of seamen. The plaintiff in this case was at the very bottom of the hierarchy of command, and the effect of the charge was to place too much responsibility upon him for the over-all operation of the stevedore."

Finally, the Court summed up (App. 10a):

> "Thus the Court held that the required standard of seaworthiness must be met whether any one complains or not, and to permit a jury to consider the absence of complaints or demands for other or additional equipment is to detract from the standard required."

1 d. *The trial court erroneously instructed the jury might consider the fact Plaintiff and his fellow longshoremen "did not ask for wire or cord to tie or lash the spreader to the wire sling or cable."*

This portion contains one of the most vicious vices in the charge. The philosophy appears to be that the **long-**

shoreman must become the guarantor of his own safety. Instead of requiring the shipowner to furnish a seaworthy ship equipped with seaworthy appliances, the trial court would impose the harsh responsibility on the longshoreman of rendering seaworthy whatever appliances are supplied him. This is a dangerous doctrine — one which militates against the traditional humanitarianism with which this Court has treated maritime personal injury claimants.

In disposing of this error, the Court of Appeals combined it with the "no complaints" defect. The Court's treatment will be found in 1 c, supra.

1 e. *The trial court erroneously instructed the jury might consider the fact the men at the forward end of the 30-35 foot crate, instead of using the method followed by the Plaintiff, passed the spreader up by hand.*

This portion of the charge — given when the trial court was dealing with the issue of liability and not damages — carries the strong inference that a longshoreman must, at his peril, choose between two different methods of doing something or, expressing it legalistically, he **must assume the risk.**

The fact that a route is taken — or one method chosen — which is less safe than some available alternate constitutes no defense to an action based on unseaworthiness. In ruling on such a situation, this Court in a Per Curiam decision reversed the Court of Appeals of the Second Circuit (*Palermo v. Luckenbach Steamship Company, Inc.*, 1957, 355 U.S. 20, 2 L. Ed. 2d 3, 78 S. Ct. 1).

The shipowner requested the trial court to instruct the jury that if the longshoreman knew or ought to have known of a safe passageway on the starboard side and nevertheless voluntarily chose to use a port passageway which was unsafe, he was not entitled to recover. The trial court refused

to so instruct and the Court of Appeals reversed on this ground. This Court reversed the Court of Appeals, holding the trial court did not commit reversible error in refusing to charge as requested by the shipowner.

The Court of Appeals found little difficulty in holding this part of the charge to be error. It asserted, simply (App. 5a):

> "In this connection, we also think it was error to charge the jury that they might consider Ballwanz's failure to 'pass up' the spreader by hand instead of 'slinging it up' as evidence of contributory negligence on his part."

As authority for its ruling the Court of Appeals observed (App. 9a):

> "The courts have held that where a seaman has a choice between a seaworthy or an unseaworthy part of a ship his use of the latter will not relieve the owner of his responsibility." *Palermo v. Luckenback Steamship Co., Inc., supra* . . ."

2. *The trial court committed reversible error in directing the entry of a judgment in favor of the Defendant on the basis of Answers to Issues which were conflicting and irreconciliably inconsistent.*

The factual situation in the instant case was a very limited, a very precise one. It dealt with the sufficiency of the loading gear and the conduct of the ship's company respecting it. The legal question involved was: Was the loading gear, consisting of the stiff wire cable and the unsecured wooden spreader, unseaworthy or was any member of the ship's company negligent with respect thereto?

With respect to this closely delineated question, the jury decided:

> Issue B. **Isthmian** was **negligent.**

Issue C. Isthmian's negligence was not a proximate cause of the injury.

Issue E. **Ballwanz's contributory negligence** amounted to **50%.**

Since Ballwanz was 50% negligent, obviously someone else had to be the remaining 50% negligent. The someone else was, as established by the jury in Answer B, the shipowner.

The sole remaining question was: **Was the negligence of the shipowner causally related to the injury?** The answer is inescapable. Since the whole case revolved about the loading gear, consisting of the springy, stiff wire cable and the loose, unsecured wooden spreader, since the unsecured spreader fell out of the stiff wire cable as it was being lifted from the hold, and since the spreader struck and injured the plaintiff — the negligence had to be related to the loading gear and, ergo, had to be related to the resulting injury.

The answers to the issues were intrinsically inconsistent and, therefore, fatally defective. Because of their irreconciliability, they furnished no basis for the entry of a judgment in favor of the defendant shipowner.

(It is interesting to note that although the jury found no unseaworthiness it did find the shipowner negligent. Because the vigor of the unseaworthiness doctrine was so debilitated by the charge, the jury obviously concluded that it was more difficult to prove unseaworthiness than to prove negligence.)

The court dealt with this defect in the judgment in the following fashion (App. 4a):

> "In the factual context of this case it was error to enter a verdict for the defendant on the basis of the

jury's answers to the special issues submitted. On these issues the jury found the ship to be negligent. No evidence submitted to the jury tended to show the vessel negligent except in one particular and that was with reference to the inadequacy of this equipment and the manner of its use. If the ship was negligent, that negligence consisted of its failure to prohibit the inadequate equipment from being used, or if it was being used improperly then to stop such improper use."

Further analyzing the extremely limited factual backdrop of the case, the Court observed (App. 5a):

"In short, the theory upon which the case was tried was that the injury was caused by the negligence of either the shipowner or the plaintiff or both. If in the context of these facts, the shipowner was negligent, as the jury found, then his negligence could not but have been a proximate cause of the accident . . . In the narrow factual setting of this case, we find the conclusion inescapable that these findings are inconsistent with the finding that the shipowner's negligence was not at least a proximate cause of the plaintiff's injury. This inconsistency would not support a judgment for the defendant based upon a speculation that some third person had contributed the remaining 50% of negligence which caused the accident."

The Court's final sentence on this topic reads (App. 6a):

"We find, as discussed above, that the jury's answers to the special issues submitted to it was irreconcilable."

The six instances in which the Court of Appeals found prejudicial error in either the charge or the action of the trial court have been set forth and discussed, supra, No. 1 a through e and No. 2. It buttressed its disposition of the case with sound judicial reasoning and with solid judicial

precedent. Respondent challenges as unfounded Petitioner's allegations:

1. The decision is in direct conflict with decisions of other United States Court of Appeal and with its own prior decisions.

2. The Fourth Circuit has decided important questions of federal law which have not been, but should be settled by this Court.

3. The Fourth Circuit has refused to follow a prior decision of this Court.

On the contrary, the Court of Appeals had ample authority for its decision. It found six things wrong with the conduct of the trial court in this action, any one of which would have justified a reversal and remand. The trial court

1. So diluted and weakened the warranty of seaworthiness it could scarcely be distinguished from negligence.

2. Insisted there must be "fault" on part of shipowner before the longshoreman could recover.

3. Told the jury it could consider lack of "complaints" in determining whether the spreader was unseaworthy.

4. Instructed the jury to take into consideration the plaintiff didn't ask for wire or cord to make the spreader safe (to lash it).

5. Charged the jury to take into consideration other longshoremen passed another spreader up in a different fashion.

The Petition for a Writ studiously glosses over all the above glaring defects in the charge, any one of which would have warranted the Court of Appeals in reversing and remanding. It is respectfully submitted the case would have been reversed even in the absence of the conflicting and irreconcilably inconsistent answers to issues. The action of the Court on this final point was clearly correct or, at least, not clearly erroneous.

When stripped to its barest essentials, the position of Petitioners is that a shipowner cannot be held liable for its negligence. Petitioners' theory of the case conveniently overlooks that operational negligence is an accepted basis for imposing initial liability on a shipowner. *Crumady v. The Fisser*, 358 U.S. 423, 3 L. Ed. 2d 413, 79 S. Ct. 445. See also *Palazzolo v. Pan Atlantic Steamship Corp.*, 211 F. 2d 277, affirmed 350 U.S. 124; *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4.

Conclusion

It is submitted the lower court, in reaching its salutary decision, merely applied deeply anchored principles of maritime law. The case was disposed of by applying elementary and well established principles of law to a rather simple factual situation. The action taken by the Court of Appeals was fully justified by the applicable law and the facts.

For the reasons developed in the Argument and summarized immediately above, this Court is urged to forestall the Petitioners' attempt to shadow box with its home-made straw-man by denying the application for a writ of certiorari.

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